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OCTOBER TERM, 1961

No. 63

MORGAN C. CHEWNING,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

REPLY BRIEF FOR THE PETITIONER

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This reply brief is directed to the contention in respondent's brief that the record does not show that petitioner's federal constitutional right to counsel was adequately raised in the state courts. This brief will demonstrate that respondent's arguments are without merit and that the case is within the provisions of 28 U.S.C. §1257(3).

Petitioner's brief, at pages 4-7, traces the proceedings in the state courts. When the proceedings are viewed against Virginia law and decisions of this Court, it is clear that the federal claim which petitioner now urges here was raised and actually litigated in the Virginia courts. Moreover, the

judgment cannot be supported by an independent state ground.

Respondent's contention appears to be based on two alleged pleading defects: (1) he says that petitioner, in his habeas corpus petition, did not specifically aver that he was indigent at his recidivist trial; (2) respondent further argues that petitioner, in his habeas corpus petition, did not expressly mention the Federal Constitution. These points will be disposed of in this order.

1. Respondent's argument directed to the lack of a specific averment of indigency confuses pleading with proof, is unsupported by anything in Virginia law and is contrary to this Court's previous decisions.

Petitioner's brief of course goes on the premise that the Fourteenth Amendment right to have court-appointed counsel covers only defendants financially unable to obtain counsel. There is no suggestion in the record or petitioner's brief to the contrary. If at a hearing on this habeas corpus petition the evidence showed that at his recidivist trial petitioner had been financially able to get a lawyer but voluntarily chose not to do so, the court at that time would be justified in holding under those facts that a violation of the right to counsel had not been established. But here there has been no hearing. Petitioner has been denied that opportunity by the courts below. There are no evidentially established facts before the Court, only allegations. Respondent has confused the requirements of proof with those of pleading. Although the fact of indigency is an element of the federal right invoked, it does not follow that this element must be expressly pleaded. It is significant that respondent cites no decision, rule or statute which renders a habeas corpus petition fatally defective because it does

not explicitly aver indigency. Indeed, on authority and principle there is no such pleading requisite.

Section 8-596 of the Virginia Code provides that the writ of habeas corpus "shall be granted forthwith" to any person showing "probable cause to believe that he is detained without lawful authority."[1] The Law and Equity Court, considering all the allegations of the petition, concluded that there was no probable cause; thus it did not grant the writ.[2] In deciding this the court made no mention of any pleading defect or of any want of sufficient allegation. Instead the court squarely decided petitioner's federal constitutional claim, holding that under *Gryger* v. *Burke*, 334 U.S. 728, there was no right to counsel at a recidivist trial (R. 9). This view of the pleading by a Virginia judge goes far in itself to refute respondent.

While there is no Virginia case law precisely in point, the Virginia view of pleadings generally is illuminating, since habeas corpus is a civil action. *Smyth* v. *Godwin*, 188 Va. 753, 51 S.E.2d 230 (1949). As there was no response

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[1] Habeas corpus is an appropriate remedy in Virginia for a prisoner attacking his sentence on federal constitutional grounds. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953). Respondent does not dispute this.

[2] Respondent's intimation (Respondent's Brief, pp. 10-11) that the Law and Equity Court was without authority to entertain this habeas corpus petition and to grant the writ is wholly without merit. The habeas corpus jurisdiction of that court appears unequivocally from a reading together of sections 17-147, 17-164, and 8-596 of the Virginia Code. Respondent actually refutes his own point as the top of page 11 of his brief. If the Law and Equity Court had granted the writ, which it refused to do, and if a hearing had been held on petitioner's allegations, that hearing would have been conducted in the sentencing court, the Circuit Court of the City of Richmond. Virginia Code, 1950, §8-598 (1960 Supp.). But this in no way affects the power of the Law and Equity Court to pass on the petition, as it did here, and either dismiss it or grant the writ. *Morris* v. *Smyth*, 202 Va. 832, 120 S.E.2d 465 (1961).

filed to the petition, the posture of the case is analogous to that of a complaint met by a demurrer. That is, the petition is to be tested on its face, assuming all of its allegations to be true. *Morris* v. *Smyth*, 202 Va. 832, 120 S.E.2d 465 (1961). The Virginia court has said that the facts in a pleading admitted by a demurrer are "(1) facts expressly alleged; (2) facts which are by fair intendment impliedly alleged; and (3) facts which may be fairly and justly inferred from the facts alleged. . . ." *Ames* v. *American Nat. Bank*, 163 Va. 1, 37, 176 S.E. 204, 215-16 (1934). The court has also said that a written pleading need only be "such as to enable a person of common understanding to know what was intended." *Levitin* v. *Norfolk Nat. Bank*, 163 Va. 694, 701, 177 S.E. 205, 208 (1934). Petitioner's allegations, read in this light, show a prima facie claim of violation of his constitutional right to counsel.

Petitioner alleged that the court tried and sentenced him as a recidivist "without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958" (R. 2). Surely it can be fairly implied or inferred from this that petitioner was without counsel and was financially unable to obtain counsel for himself. Surely a "person of common understanding," particularly a judge familiar with right-to-counsel problems, would so read this petition. And the judge in the Law and Equity Court did so read it. Thus as a matter of Virginia procedure, the petition alleged enough facts to present a claim of unconstitutional denial of counsel within the Fourteenth Amendment.

But since petitioner is claiming a federal right, the sufficiency of his allegations is not entirely dependent on the state's view of the pleading. Even if it could be demonstrated, which it cannot be, that the Virginia court would

hold this petition insufficient to present the federal claim it would still be open for this Court to hold otherwise. For the Supreme Court has the final word on the adequacy of pleadings asserting federal rights in state courts. *E.g.*, *Brown* v. *Western Ry.*, 338 U.S. 294, 296, 299; *First National Bank* v. *Anderson*, 269 U.S. 341, 346.

The Court in several state habeas corpus cases has held sufficient allegations almost identical with those in the case at bar. In *Williams* v. *Kaiser*, 323 U.S. 471, the petition alleged a request for counsel, but there was no mention of indigency. The Court said that it would presume, in the absence of evidence to the contrary, that when petitioner requested counsel he was without counsel and without funds to employ counsel (323 U.S. at 474).[3] The petitioner's allegations in *Tomkins* v. *Missouri*, 323 U.S. 485, likewise omitted mention of financial condition, but the Court sustained the claim. After all, petitioners in cases of this type are asking only that the Court order a hearing; presumably they must still prove indigency in order to establish a violation of federal right. In *Tomkins* the Court pointed out that to hold a layman behind prison walls to the skill of one trained in the law would be to compound the injury caused by the original denial of counsel (323 U.S. at 487). In *Uveges* v. *Pennsylvania*, 335 U.S. 438, the report does not indicate any express averment of indigency; "petitioner alleged that he was not informed of his right to counsel nor was counsel offered him . . ." (335 U.S. at 439). Yet the Court adjudicated the question. And in a recent case the petitioner appears to have averred only that a plea of guilty was induced when he "had no counsel present," but the Court thought this enough to require a hearing. *Wilde* v. *Wyoming*, 362 U.S. 607. It therefore seems clear from

[3] The parallel between *Williams* v. *Kaiser* and the instant case is presented in a table on page 30 of petitioner's brief.

this Court's decisions that petitioner's allegations here are sufficient to present his federal claim.

That indigency is taken for granted in connection with court-appointed counsel is pointedly illustrated by §19.1-241 of the Virginia Code, which reads:

> In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

There is not a word here about financial condition. Literally the statute calls for court appointment of counsel whenever the defendant is without representation even though he has a substantial bank account and simply prefers not to spend his money. But it is doubtful that any lawyer or judge in Virginia would seriously think of so administering this provision. The reason seems clear. The statute embodies the universal understanding that court-appointed counsel is provided only for the indigent.

Petitioner here is entitled to the benefit of the same common-sense reading of his pleading. From what he has alleged, indigency can be inferred—for pleading purposes. This is consistent with Virginia law; and the decisions of this Court require it.

2. Respondent's argument that petitioner raised no federal claim in the state courts because he did not specifically mention the United States Constitution in his habeas corpus petition is unsound and overlooks pertinent Virginia pleading rules and appellate practice as well as this Court's decisions. These read with the record reveal that petitioner has adequately invoked the federal constitutional right which he now asserts in this Court.

Petitioner alleged in his habeas corpus petition that he was "unlawfully, unjustly and illegally imprisoned, . . . restrained and deprived of his liberty" by the respondent (R. 1) in that respondent was confining him pursuant to the recidivist sentence imposed on petitioner without counsel (R. 2). It is assumed here, in accordance with the preceding argument, that petitioner has sufficiently alleged facts showing prima facie a claim of denial of the federal constitutional right to counsel. Respondent's point here is not that petitioner has insufficiently pleaded facts but that he has not pleaded law. The argument is that the habeas corpus petition, although it sets out facts showing a claim of federal right, is defective in that it does not go further and invoke explicitly by name the Federal Constitution. There are several valid answers to this argument.

In the first place the Virginia rule, in line with pleading practice generally, is that it is not necessary to plead law when the court will judicially notice the law. The court said in *Shumaker's Administratrix* v. *Atlantic Coast Line Railroad,* 125 Va. 393, 396, 99 S.E. 739, 739-40 (1919):

> It is never necessary to plead any matter of law of which the Court will take judicial notice. It is the function of the pleading to state facts and not law. Our courts take judicial notice of the public acts of Congress as well as of those of the state, and will apply each as appropriate.[4]

[4] In *E. I. DuPont de Nemours & Co.* v. *Snead's Adm'r,* 124 Va. 177, 183-84, 97 S.E. 812, 813 (1919), the court, pointing out that it is "wholly unnecessary" for a party "to say anything about the law of the case," stated: "It is the function of pleadings to state facts, and the court takes judicial notice of the law. The judgment in such cases is but the conclusion of a perfect syllogism, the major (but unexpressed) premises of which is the substantive law, and the minor the fact put in issue by the pleadings." When the facts are stated, "the court will apply the law arising therefrom."

If the Virginia courts take judicial notice of federal legislation, *a fortiori* they take similar notice of the Federal Constitution, which of course binds Virginia judges directly under the Supremacy Clause. In *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, the foundation case for the Court's jurisdiction over state decisions, Justice Story said in response to the jurisdictional argument that the Virginia court had not decided a question under the treaty:

> "... we are bound to consider that the court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice" (1 Wheat. at 360).

Nothing suggests that this pleading principle does not apply to habeas corpus petitions. That it does apply is manifested by the way in which the Law and Equity Court passed on the petition in this case. The judge there had no doubt that the petitioner's allegations invoked a federal right. For the judge expressly applied the Fourteenth Amendment, noting that it was "here relied upon," and ruled that it gave petitioner no right to court-appointed counsel at his recidivist trial, citing *Gryger* v. *Burke*, 334 U.S. 728, and *Chandler* v. *Fretag*, 348 U.S. 3 (R. 9).[5] This is the very ruling complained of by petitioner in this Court. To say now that this question was not appropriately before the state court is to imagine retrospectively that there was some Virginia pleading requirement, unsupported by any

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[5] The opinion of the Law and Equity Court is in the record before this Court (R. 9-12) and was a part of the record before the Supreme Court of Appeals. Rule 5:1, §3(a), Rules of Supreme Court of Appeals. It must be considered in determining that the federal claim was presented to and decided by the state courts. Cf. *Bryant* v. *Zimmerman*, 278 U.S. 63, 67-69.

Virginia decision or legislation, which was either unknown to or ignored by the Virginia trial judge. Surely this Court will not make such an assumption or impose on the Virginia courts a technical pleading requirement which those courts have rejected. In short, in accordance with Virginia practice, a "right . . . claimed under the Constitution" (28 U.S.C. §1257(3)) was raised and decided in the Law and Equity Court. And the claim was preserved in the subsequent proceedings.

But petitioner does not need to rest jurisdiction on this alone. After the denial of the writ in the lower court, petitioner pressed his case through appropriate procedure to the Supreme Court of Appeals of Virginia.[6] In his petition for writ of error, filed in that court, he specifically asserted that he was claiming a right to counsel under "the 14th Article of Amendment of the Constitution of the United States" (R. 21) and that the question was raised under the "Due Process Clause of the 14th Amendment" (R. 23). He set out and discussed relevant decisions of this Court (R. 24-25, 27).[7] On the basis of this petition and the record from the lower court, the highest court of Virginia refused a writ of error and affirmed the judgment denying the habeas corpus petition (R. 29).[8]

In the Supreme Court of Appeals of Virginia a constitutional question can be raised for the first time and adjudi-

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[6] Respondent does not suggest that petitioner in any way failed seasonably to pursue the appropriate procedure for appellate review. Such a contention would be without merit.

[7] Respondent agrees that petitioner asserted the federal question in the Supreme Court of Appeals (Resp. Brief, p. 12).

[8] Concerning petitions for writs of error, §8-476 of the Virginia Code provides in part: "If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained."

cated, even though it was not raised in the lower court. A recent expression of this is in *Almond* v. *Day*, 197 Va. 419, 430, 89 S.E.2d 851, 859 (1955): ". . . we have repeatedly held that the unconstitutionality of a law need not be specially pleaded and may be raised for the first time in this court." See also *Burnette* v. *Commonwealth*, 194 Va. 785, 786, 75 S.E.2d 482, 483 (1953); *Adkins* v. *City of Richmond*, 98 Va. 91, 34 S.E. 967 (1900). In *Speer* v. *Commonwealth*, 23 Grat. (64 Va.) 935 (1873), the appellate court held that on the record from the trial court no constitutional question was raised; however, appellant in his petition for writ of error had supplied an essential fact which did raise for the first time a question under the Commerce Clause of the Federal Constitution, and the court proceeded to decide it. In the *Adkins* case, *supra*, the Virginia court explained the distinction between its practice and that of the United States Supreme Court. It pointed out that the latter Court, because of the particular statutory restriction on its jurisdiction, could not decide a constitutional question not set up or claimed in state courts, but, it noted in comparison, there is no such restriction on the Virginia Supreme Court of Appeals in reviewing lower court decisions. It thus appears under these Virginia cases that constitutional questions, unlike other questions, are allowed to be asserted for the first time in the appellate forum.* This rule of practice coupled here with an actual decision of the federal constitutional question by the lower court establishes this question sufficiently in the record for the Court's jurisdiction. Cf. *Haire* v. *Rice*, 204 U.S. 291, 297-99.

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* The cases do not make clear whether a party has a right to raise a constitutional question for the first time in the appellate court or whether the court only allows this in its discretion. But even if this is a matter of discretion this Court's jurisdiction is not foreclosed, because the state court cannot exercise its discretion to refuse to entertain federal constitutional questions while passing upon kindred issues raised in the same manner. *Williams* v. *Georgia*, 349 U.S. 375, 383.

Thus even if it be assumed that the federal question appears inadequately in the record made in the Law and Equity Court, the federal claim was properly before the highest court of the state since the state law allows a constitutional question to be raised there, although it was not raised below. This satisfies the "specially set up or claimed" provision of §1257(3). See *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, 651.[10]

Not only was the federal claim now argued in this Court appropriately put before the state court, but its order refusing the writ of error and affirming the denial of habeas corpus necessarily involved a decision of this federal claim adverse to petitioner. Although it likewise involved decision of state questions, there is no independent state ground adequate to support the judgment. Respondent has suggested none, other than his insubstantial points answered in this reply brief. "And when we search for an independent state ground to support the denial, we find none." *Williams* v. *Kaiser*, 323 U.S. 471, 478.

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[10] *Bailey* v. *Anderson*, 326 U.S. 203, is not contrary to this conclusion. There the Court dismissed an appeal from the Supreme Court of Appeals of Virginia for want of a properly presented federal question. The appellant had asserted his federal question for the first time in the state appellate court, and writ of error had been refused without opinion. But unlike the instant case, the federal question had not been passed on by the trial court; the trial record was silent as to the federal issue. In that situation this Court thought itself unable to say that the state court in refusing the writ of error had passed upon the federal question. In the instant case, however, the Law and Equity Court actually adjudicated Chewning's federal claim and denied it; on that record and in face of a petition urging that the federal claim had been erroneously denied the state Supreme Court of Appeals affirmed the decision. That was not the case in *Bailey* v. *Anderson*.

To hold that petitioner's claim of denial of counsel has not been adequately presented in this record would be to burden the assertion of this fundamental right with artificial, unnecessarily narrow, procedural restrictions. The claim stands out in the record for all who can read to see. It has been decided against petitioner by the Virginia court in this proceeding. To require Chewning, an indigent prisoner, to start all over again would only produce a cruel and needless repetition.[11] It would "compound the injury caused by the original denial of counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 487.

The question of petitioner's right under the Fourteenth Amendment to have counsel at his recidivist trial was properly before the highest court of the state and was necessarily decided by the final decision here under review. This Court has jurisdiction under 28 U.S.C. §1257(3) and should proceed to adjudicate the constitutional issues presented.

Respectfully submitted,

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October, 1961

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[11] If petitioner filed a new habeas corpus petition in the Virginia state court attacking the same sentence on the same ground—denial of right to counsel—there is a distinct possibility that he would be met with a res judicata objection, since the Virginia court has actually adjudicated the issue on both federal and state grounds. See *Petrus* v. *Robbins*, 196 Va. 322, 329-30, 83 S.E.2d 408, 412 (1954); *Ferebee* v. *Hungate*, 192 Va. 32, 36-37, 63 S.E.2d 761, 764 (1951). This is further indication that the present judgment is reviewable.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1961.

Morgan C. Chewning, Petitioner, *v.* W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary.	On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia.

[February 19, 1962.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was sentenced to 10 years in prison under Virginia's recidivist statute. Va. Code, 1950, § 53–296. This statute provides that when it appears that a person, convicted of an offense, has been previously sentenced "to a like punishment," he may be tried on an information that alleges "the existence of records of prior convictions and the identity of the prisoner with the person named in each." The statute goes on to provide that the prisoner may deny the existence of any such records, or that he is the same person named therein, or both.

If the existence of the records is denied, the court determines whether they exist. If the court so finds and the prisoner denies he is the person mentioned in the records or remains silent, a jury is impaneled to try that issue. If the jury finds he is the same person and if he has one prior conviction, the court may sentence him for an additional term not to exceed five years. If he has been twice sentenced, the court may impose such additional sentence as it "may deem proper."

Petitioner, then imprisoned in Virginia, was charged with having been three times convicted and sentenced for a felony. He was accordingly tried under the recidivist

statute; and he is now serving the sentence imposed at that trial. He brought this habeas corpus proceeding in the Virginia courts to challenge the legality of that sentence. The crux of his complaint was that he was tried and convicted without having had the benefit and aid of counsel, though he had requested one.[1] The Law and Equity Court of Richmond denied relief; and the Supreme Court of Appeals of Virginia refused a writ of error. While the grounds for the action of the Supreme Court of Appeals are not disclosed, the Law and Equity Court wrote an opinion, making clear that it ruled on the federal constitutional claim:

> "As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In Gryger v. Burke, 334 U. S. 728, where release or habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731):
>
> "'. . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid.'
>
> "This holding was adhered to in Chandler v. Fretag, 348 U. S. 3, where it was decided that, while a State is not required under the Fourteenth Amendment to furnish counsel, it cannot deny the defendant in a repeater hearing of the right to be heard by counsel of his own choice."

The Law and Equity Court, while conceding that a proceeding under the recidivist statute was "criminal" and that in that proceeding the accused was entitled to most

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[1] He apparently did not appeal from the conviction. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S. E. 2d 810, however, allows the deprivation of a constitutional right to be raised by habeas corpus.

of the protections afforded defendants in criminal trials, concluded that petitioner was not entitled to have counsel appointed to assist him, since the proceeding was "only connected with the measure of punishment for the last-committed crime." Cf. *Fitzgerald* v. *Smyth*, 194 Va. 681, 689–690, 74 S. E. 2d 810, 816.

We put to one side *Gryger* v. *Burke*, *supra*, on which the Virginia court relied. In that case, identity was the only issue and the specialized circumstances seemed to a majority not to require the appointment of counsel. Under the present recidivist statute, the situation is quite different. As we have seen, the "existence" of records of prior convictions of the kind described in the statute is an issue tendered in Virginia. We said of a like issue in *Reynolds* v. *Cochran*, 365 U. S. 525, 531, ". . . if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding." In that case we also pointed out that the issue of "identity" may at times present difficult local law issues, as for example "whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody." *Id.*, p. 532.

In *Reynolds* v. *Cochran*, *supra*, the accused had his own lawyer and only asked for a continuance. But the holding in the case applies equally to an accused faced with an information under Virginia's recidivist statute and who has no lawyer. It is "the nature of the charge" (*Tomkins* v. *Missouri*, 323 U. S. 485, 488) that underlines the need for counsel. In trials of this kind the labyrinth of the law is, or may be, too intricate for the layman to master. *Id.*, pp. 488–489; *Williams* v. *Kaiser*, 323 U. S. 471, 474. Virginia has held that the validity of any of

the prior convictions, used to bring the multiple-offender statute into play, may be inquired into. See, *e. g.*, *Wesley* v. *Commonwealth*, 190 Va. 268, 272–274, 56 S. E. 2d 362, 364. These may involve judgments of conviction in any state or federal court in the Nation. Counsel, whom we appointed to represent petitioner here, has shown the wide variety of problems that may be tendered. In Virginia, a trial under this statute may present questions such as whether the courts rendering the prior judgments had jurisdiction over the offenses and over the defendant and whether these offenses were punishable by a penitentiary sentence. *Wesley* v. *Commonwealth*, *supra*, p. 273. In Virginia, a sentence in excess of the one the court rendering it had power to impose is "void for the excess only." See *Royster* v. *Smith*, 195 Va. 228, 235, 77 S. E. 2d 855, 858–859. In Virginia, a court in considering whether the prior convictions afforded a proper basis on which to invoke the recidivist statute has considered whether, in a prior trial, the defendant was represented by counsel and whether it was a fair and impartial trial. *Willoughby* v. *Smith*, 194 Va. 267, 271, 72 S. E. 2d 636, 639. In Virginia, a prior conviction that is on appeal may not be the proper basis for a recidivist charge. *White* v. *Commonwealth*, 79 Va. 611. And there appears to be a question whether two prior convictions rendered the same day or at the same term could both be used in a Virginia multiple-offender prosecution. *Commonwealth* v. *Welch*, 4 Va. 57. See *Dye* v. *Skeen*, 135 W. Va. 90, 102–103, 62 S. E. 2d 681, 688–689.

Double jeopardy and *ex post facto* application of a law are also questions which, as indicated in *Reynolds* v. *Cochran*, *supra*, p. 529, may well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests. We intimate no opinion on whether any of the problems mentioned would arise on petitioner's trial nor, if so, whether

any would have merit. We only conclude that a trial on a charge of being a habitual criminal is such a serious one (*Chandler* v. *Fretag*, 348 U. S. 3), the issues presented under Virginia's statute so complex, and the potential prejudice resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials [2] is equally applicable here.

Reversed.

[For opinion of MR. JUSTICE HARLAN concurring in the result see Nos. 56 and 57, *Oyler* v. *Boles* and *Crabtree* v. *Boles*.]

[2] *Williams* v. *Kaiser*, *supra*; *Tomkins* v. *Missouri*, *supra*; *Townsend* v. *Burke*, 334 U. S. 736; *Hudson* v. *North Carolina*, 363 U. S. 697; *McNeal* v. *Culver*, 365 U. S. 109.